No. 15323

United States Court of Appeals

For the Ninth Circuit

FLOYD SMITH,
Appellant,

vs.

KENNETH BUCK and KENNETH BINDER,
Appellees.

Appellees' Brief

Appeal from the United States District Court
for the District of Oregon

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STATEMENT OF THE CASE

Plaintiff* brought this action to recover damages for personal injuries suffered as a result of the alleged negligence of defendants*. Plaintiff had stopped his car on the pavement of a snowy highway, and he and his passenger were putting chains on the rear wheels of his car, when he was struck by the trailer of defendants which was attempting to drive past him.

* Plaintiff-appellant is referred to throughout for clarity as "plaintiff". Defendant-appellee Binder, the owner of the truck, and defendant-appellee Buck, his agent, are referred to throughout as "defendants". Defendant Buck was the only one of the defendants actually present at the time of the accident.

At the close of plaintiff's testimony on liability, defendants moved for a dismissal upon the ground that plaintiff's testimony affirmatively showed him to have been guilty of contributory negligence and to have assumed the risk of the danger attending his position. The trial court granted the motion on the ground that defendant had been guilty of no negligence.

Plaintiff has appealed, arguing only the point that there was sufficient evidence of the negligence of defendants to require that the case be submitted to the jury. Defendants not only contend that there was no sufficient evidence of such negligence, but that their motion was well-taken upon the ground that plaintiff was as a matter of law guilty of contributory negligence, and that he had assumed the risk.

STATEMENT OF FACTS

The accident in question occurred on U.S. Highway No. 26, approximately six miles east of Government Camp, Oregon. It was snowing, and the road was slick (R. 16). Plaintiff was proceeding east (R. 14-15). At about 4 p.m., plaintiff's car lost traction (R. 16), and he parked it about two to four feet from the guardrail (R. 16-17) for the purpose of putting on chains. He could have parked it closer to the guardrail, but he would not have had room to work on the right hand chain (R. 17). The guardrail was within a few inches of the pavement at that point (R. 39-40). Immediately west of that point there was

a wide shoulder on the plaintiff's right hand side, and across the highway from where he parked was another wide shoulder (R. 40). After plaintiff parked, a woman going in the same direction as plaintiff pulled off the highway into this latter space (R. 22-23).

Plaintiff and his passenger were engaged in putting on the chains, plaintiff working on the left wheel and the passenger on the right wheel (R. 18). Plaintiff was lying down right up close to his automobile (R. 19). Defendants' truck and trailer, a 60 foot, 31,000 pound rig (R. 41, 50), came from behind plaintiff. Another truck driver, who had parked behind plaintiff (R. 29) was helping the woman across the highway put on her chains (R. 30) when he noticed two trucks coming from opposite directions (R. 30). He signaled the other one to stop (R. 31), and signaled defendant's truck to come through (R. 31, 39). Defendants' truck, which had been approaching at about 20 to 25 miles an hour (R. 31), attempted to go through the gap and as he was passing plaintiff, the trailer slid down and hit plaintiff and his passenger (R. 32). The truck and trailer were immediately brought to a stop ten to twelve feet further on (R. 19).

At the point of the accident, plaintiff was parked just past the center of a curve (R. 24). The road at that point was steeply banked down toward plaintiff (R. 51). The gap between the woman who was

off the road and plaintiff was variously estimated from 15 feet by defendant (R. 46) to 30 to 40 feet by plaintiff (R. 20).

Defendant testified as an adverse witness (R. 40) that the trailer slid sideways because "When I slowed down to go between the cars I was going so slow that it slipped sideways on the slick snow." (R. 43). He did not see plaintiff's car till he got around the truck parked 150 feet behind it (R. 44). If he had stopped, he would have slid down the grade of the highway into the parked cars (R. 47). He had planned to stop when he first saw all the parked cars, but proceeded when he was waved through (R. 47). Prior to reaching that spot he had not felt he needed any chains (R. 49).

SUMMARY OF ARGUMENT

A. Plaintiff was Guilty of Contributory Negligence and Assumed the Risk of his Position.

Despite the fact that this was not the ground of the trial court's ruling, the point, having been seasonably presented to the trial court, may be urged upon this appeal.

Plaintiff was guilty of negligence in parking on the paved portion of the highway. Since there were other areas immediately available where it would have been practicable to pull completely off the highway, plaintiff had the burden of proving that his car was disabled within the meaning of the Oregon

statute. There is no evidence to this effect, and therefore plaintiff's violation of the statute in parking on the pavement is unexcused. His negligence in this regard was clearly a proximate cause of the accident.

Plaintiff was also negligent in attempting to put on chains under the circumstances without taking any precautions for his own safety. There is no evidence that he kept any lookout or asked his passenger to do so. The evidence is that he was not even aware of the approach of defendants' truck and trailer until they were alongside him. Even if he had not been negligent in parking the car where he did, his failure to exercise any precautions while changing the tire was negligence which contributed to his injury.

Furthermore, the risk of his situation being obvious and apparent, and plaintiff having been injured from a danger incident to the risk he must have realized, he assumed such risk, and was not entitled to recover when a vehicle slid down the banked highway and injured him.

B. There Was no Evidence of Negligence on the Part of Defendants.

Mere skidding or slipping on ice or snow is not in itself negligence or evidence thereof. Plaintiff must establish that such slipping was caused by an act of negligence on the part of defendant. In this case, it is established that defendant was attempting to nego-

tiate the dangerous situation created by plaintiff and the other parked cars, at a reasonable speed, under control, and with due care. In fact, the only evidence of the reason for the trailer slipping is the slowness of the speed at which defendant was required to drive by reason of the dangerous situation confronting him. The trial court was correct in holding that there was no evidence that defendants had been guilty of any negligence.

ARGUMENT

A. Plaintiff, As a Matter of Law, Was Guilty of Contributory Negligence, and Assumed the Risk of His Position.

1. *The Issue of Contributory Negligence May Be Raised Upon This Appeal.*

Defendants' motion for a dismissal was based upon contributory negligence and assumption of risk (R. 52). The trial court, however, ordered a dismissal upon the ground that defendants were guilty of no negligence (R. 52). Upon this appeal, plaintiff has chosen to specify and to argue in his Appellant's Brief only the issue of defendants' negligence (Appellant's Br. 4).

Since an appellate court may affirm a judgment of the court below upon any ground seasonably urged by the appellee in that court, even though that ground is not the basis of the trial court's decision, the issue of contributory negligence is still available

to defendants upon this appeal, despite the trial court's failure to rule upon this aspect of the case. *Commissioner v. Stimson Mill Co.,* 137 F. 2d 286, 287 (CCA 9, 1943). It is the position of defendants that their motion for dismissal was well-taken upon the grounds therein stated, and that the judgment of the court below should be affirmed upon this ground as well as upon the ground stated by the court.

2. *The Plaintiff Was Guilty of Contributory Negligence in Parking His Vehicle Upon the Paved Portion of the Highway.*

The Oregon statute applicable to this situation is ORS 483.320, which reads, in relevant part, as follows:

> "(1) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved, improved or main traveled portion of any highway, outside a business or residence district, when it is practicable to park or leave such vehicle standing off such portion of the highway; and in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than 16 feet upon the main traveled portion of the highway opposite such standing vehicle is left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of 200 feet in each direction upon the highway.
>
> "(2) * * * * *

> "(3) This section does not apply to the driver of any vehicle which is disabled while on the paved, improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving the vehicle in such position * * *."

It is undisputed that the plaintiff herein parked on the paved portion of the highway. He testified upon direct examination that he parked two to four feet from the guardrail (R. 17), so as to leave space to put a chain on the right rear wheel. Plaintiff's witness Moore testified that the pavement came up to within about eight inches of the guardrail at that point (R. 39-40).

It was also undisputed that there was a wide space on plaintiff's right hand side of the road traveling east immediately before plaintiff reached the guardrail (R. 40), and that on the left hand side of the highway, immediately across from where plaintiff parked, there was another wide shoulder (R. 40). After plaintiff had stopped, a lady parked a car off the highway in the wide space opposite where he had parked (R. 22-23).

Since it is established that plaintiff parked upon the main traveled portion of the highway, and that there was a place immediately across the highway where it was practicable to park the vehicle, plaintiff was guilty of negligence unless he has met the bur-

den of showing that he was entitled to the benefit of the exception relating to disabled vehicles contained in subsection (3) of the statute. As stated in *Watt v. Associated Oil Co.,* 123 Or. 50, 260 P. 1012 (1927) of the earlier and analogous Oregon statute on this subject, in a case in which the defendant was charged with negligence in violating that statute:

> "One who parks his automobile upon the public traveled part of a highway is prima facie a violator of the law, and it is incumbent upon him to show affirmatively that it was necessary for him to so park it at that time and place. It is not the duty of a party injured in a collision, under such circumstances, to show that such parking was not necessary, but for the other party to bring himself within the exception prescribed in the statute."

This holding is in accord with the substantial weight of authority. See Ann. 131 ALR 562, cases cited in Sect. VII, p. 603.

The evidence of plaintiff completely fails to establish that he could not have driven his car across the highway to the safe shoulder on the other side. If anything, the only inference that can be drawn from his testimony is that he could have moved his car further, but at best the question is left in a completely speculative condition. Plaintiff states in his Brief (p. 3) that he "could proceed no further," but the evidence fails to bear this out.

Plaintiff testified, on direct examination (R. 16):

"Q. For what reason did you park your car? Why did you stop it or park it?

A. To put my chains on.

Q. What necessity was there for chains at that time and place?

A. I lost traction."

Plaintiff's witness Moore testified, also on direct examination (R. 28):

"Q. Then as you were approaching that curve, did you see anything unusual?

A. Mr. Smith's car was—his wheels were spinning. Other than that nothing unusual, no.

Q. Did you see Mr. Smith stop his car?

A. Yes.

Q. On which side of the road did he bring his car to a stop?

A. On the right-hand side."

It is common knowledge that a car's wheels may be spinning and that it may have lost traction, without being totally unable to move. No witness testified that plaintiff was "stuck," a word that witness Moore used to describe the condition of the woman parked across the road (R. 29). At the very best, the foregoing testimony leaves totally in doubt the vital ques-

tion as to whether the plaintiff could have driven his car across the highway.

Other questions and answers addressed to plaintiff, although again not entirely clear, leave a definite impression that his car was still able to move, despite having "lost traction." Thus, still on direct examination, plaintiff testified (R. 17):

> "Q. Were you able at that time and place to bring your car any closer to the guardrail than you did?
>
> A. *I probably could have,* but I wouldn't have had room to have worked on the chain to get it on."
>
> "Q. Now, would you have had control of your car *if you continued to drive it at that time and place* without putting chains on?
>
> A. No, sir." (All emphasis supplied).

It appears from this testimony as if plaintiff's car was still able to move, although he would not have had control of it if he had attempted to proceed further.

In any event, the most that plaintiff can claim for the foregoing testimony is that the question of whether or not he was in a position to proceed further is left completely in doubt. It is entirely a matter of speculation and surmise whether he was entitled to the benefit of the proviso of the statute re-

lating to disabled cars. This being the case, it is axiomatic, both in the Oregon* and Federal** courts, that the evidence is not sufficient to support a verdict. See, e.g., *Moore v. Chesapeake & Ohio R. Co.*, 340 U.S. 573, 578, 71 S. Ct. 428, 430, 95 L. Ed. 547 (1951), wherein the Supreme Court stated that, "Speculation cannot supply the place of proof."

Moreover, this Court has pointed out that, "Courts may not find facts from speculation, no matter how difficult or impossible it may be to produce evidence establishing the fact in dispute." *Controller of California v. Lockwood,* 193 F. 2d 169, 172 (C.A. 9, 1951). How much more so is this the case when plaintiff himself could have given direct testimony on the fact in issue, and no one else was in as good a position to obtain the information. If plaintiff wished to establish that he "could proceed no further," he should have so stated on the witness-stand. The evidence which he did produce leaves the question completely up in the air.

The statute in question and its predecessors have been before the Oregon courts many times. It is well-established that a car is disabled when it cannot

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* Lemons v. Holland, 205 Or. 163, 193, 284, P. 2d 1041, 286 P. 2d 656 (1955); Whelpley v. Frye, 199 Or. 530, 538, 263 P. 2d 295 (1953); Quetschke v. Peterson, 198 Or. 598, 610, 258 P. 2d 128 (1953); Crosby v. Braley & Graham, 171 Or. 72, 134 P. 2d 110 (1943).

** Woods v. N.Y. Central R.R. Co., 222 F. 2d 551, 552 (C.A. 6, 1955); Buford v. Cleveland & B. Steamship Co., 192 F. 2d 196, 199 (CA. 7, 1951); Baltimore v. Louisville & N. R. Co., 146 F. 2d 358, 360 (C.A. 4, 1944).

safely be moved to a place of safety under its own power. *Shelton v. Lowell,* 196 Or. 430, 437-438, 249 P. 2d 958 (1952); *Morris v. Fitzwater,* 187 Or. 191, 210 P. 2d 104 (1949). The cases have arisen in a variety of situations, and it is not necessary to discuss each of them, but we will attempt to indicate the line of authority.

The leading case on the subject is *Dare v. Boss,* 111 Or. 190, 224 P. 646 (1924). Plaintiff was injured when repairing a flat tire. He had pulled his car "as far off the road as appeared safe," and only 18 to 20 inches thereof remained on the hard surface. It would have been dangerous to drive further. There is no indication in the opinion that there was any safer place immediately available. The Court held that plaintiff's contributory negligence was a question for the jury. The Court stated the rule as follows:

> "Neither do we understand this statute to require a person to incur any chances of any serious injury by removal of a disabled car; but in such case, *if the testimony indicates that such removal would incur danger to the person occupying the car,* there is no hard and fast rule requiring him to take such chance. The 'rule of reason' applies here, and *if it should have appeared to the jury that he could have moved the car safely he would have been guilty of contributory negligence in failing to do so . . .*" (Emphasis supplied).

In *O'Brien v. Royce,* 111 Or. 488, 227 P. 520 (1924) the jury found by a special verdict that the plaintiff's car was off the main-traveled part of the road. The Court approved an instruction stating in part that if the plaintiff parked his car upon the main-traveled part of the highway when it was not disabled, he would be guilty of negligence.

In *Townsend v. Jaloff,* 124 Or. 644, 264 P. 349 (1928), a milk-truck driver parked his truck with only 12 to 18 inches thereof off the pavement. The Court reversed a judgment in his favor for failure of the court below to give an instruction that the plaintiff was thereby guilty of negligence as a matter of law. The Court emphasized the fact that the truck was not disabled, and that there was a stretch of solid shoulder adjoining the spot where he parked, upon which he could have parked completely off the highway.

In *Martin v. Oregon Stages,* 129 Or. 435, 277 P. 291 (1929), the plaintiff's fog light was loose and waving to and fro. It was a dark and rainy night, and there was considerable traffic. He drove it "as far off the highway as he safely could," in order to adjust the light. The wheels were about two feet on the paved portion. The Court pointed out that one who parks a motor vehicle on the main-traveled highway without necessity therefor is guilty of negligence, but that it was a jury question in that case whether it was safe to proceed further.

In *Holman v. Uglow,* 137 Or. 358, 3 P. 2d 120 (1931), the plaintiff's car had run out of gas, and he and the other two occupants were attempting to push it to a place of safety. The shoulder alongside where they originally stopped was narrow and muddy, and a graveled area was available 450 feet ahead. The Court held that an automobile may use a portion of a roadway in an emergency, if exercising due care, for making repairs "rendered necessary by the inability of his car to proceed," and held it to be a jury question whether the plaintiff was negligent in not leaving the car where it was.

In *Gossett v. Van Egmond,* 176 Or. 134, 155 P. 2d 304 (1945) a car, because of engine trouble, could not be driven under its own power. Plaintiff's car was preparing to tow it, and was struck by defendant's vehicle. The Court held that, giving the statute a reasonable and workable construction, the cars were not "parked" along the highway within the meaning of the statute. The cars were on the shoulder, on the verge of the ditch, and could not be moved further off the highway.

In *Morris v. Fitzwater,* 187 Or. 191, 210 P. 2d 104 (1949), plaintiff's car's lights went out. She steered to the edge of the highway, and stopped on the shoulder, about six inches from the ditch, with the left wheels about 18 inches on the paved highway. The Court held, with reference to the question in-

volved in this case, at p. 197:

> "There was, however, a conflict of testimony as to whether or not plaintiff's car could have been parked entirely off the main traveled portion of the highway, which, if such parking is practicable, the statute requires to be done. Such conflict made the question of whether or not the car was parked contrary to the statute one for the jury, and the court did not err in refusing to withdraw it."

Finally, in *Shelton v. Lowell,* 196 Or. 430, 249 P. 2d 958 (1952), the Court found it to be an issue for the jury whether the defendant was negligent in not having its disabled truck towed out of the way by another truck of the same company. The truck was occupying practically the entire width of one lane of the highway, and the jury could have found that the other truck could have towed it off to a safe place.

Returning to the instant case, it was entirely a matter of speculation whether plaintiff's car was disabled within the meaning of the statute. The burden of establishing this fact, in view of the plain command of the statute, and his admitted location entirely on the traveled portion of the highway, was on plaintiff. *Watt v. Associated Oil Co.,* 123 Or. 50, 260 P. 1012 (1927). He failed to produce any substantial evidence that the car was disabled, and the jury would not have been warranted in so finding. In the absence of evidence that it was not practicable for

him to pull into either of the readily available and safe places completely off the highway, he must be held to be guilty of negligence as a matter of law in violating ORS 483.320.

Once it is established that plaintiff violated the statute in parking his vehicle on the main traveled portion of the highway when it was practicable to park it off the highway, the question of proximate cause is readily answered. As the Court said of this precise situation in *Martin v. Oregon Stages,* 129 Or. 435, 277 P. 291 (1929):

> "Whether or not plaintiff parked his truck on the main-traveled portion of the highway determines the charge of negligence under consideration. *If plaintiff parked his truck as asserted by defendant, he is guilty of negligence as a matter of law and cannot recover. There could hardly be a difference of opinion regarding such negligence contributing to plaintiff's injury.*" (Emphasis supplied).

See also, *Leap v. Royce,* 203 Or. 566, 279 P. 2d 887 (1955), in which the Oregon Court held that if the plaintiff violates a legislative enactment which is designed for the prevention of the very accident which occurs, and the accident could not have happened but for the violation, the violation is as a matter of law the proximate cause of the accident. These conditions are present in this case.

3. Plaintiff was Guilty of Contributory Negligence in Placing Himself in a Dangerous Position on the Highway, and in Failing to Keep a Lookout.

In considering this issue, it is necessary to examine the total situation which confronted plaintiff at the time of the accident. He knew that the road was quite slippery, to an extent that he would not have had control of his car had he continued to drive without chains (R. 17). It was snowing (R. 16, 28), the sky was overcast, and visibility was not too good (R. 28). At the place where plaintiff parked, the road was deeply banked down toward him (R. 51).

Under these circumstances, with safe places to stop available immediately before he reached the guardrail, and immediately across the highway (R. 40), plaintiff chose to stop two to four feet from the guardrail (R. 17), which meant he was more than one to three feet from the edge of the paved highway (R. 39-40), for the purpose of putting on chains. Then, instead of posting his passenger as a lookout, and putting the chains on one at a time, each man started working on one of the rear wheels, plaintiff being engaged in putting a chain on the left one (R. 18).

Immediately before the impact, plaintiff was lying prone on a blanket along the left side of his car (R. 18-19). The situation was diagrammed by plaintiff on a blackboard, (R. 15) which is, of course, not a

part of the record*. Plaintiff did testify that he was "right up close" to his car (R. 19), but in view of the distance he had parked from the guardrail and the width of the car, he must have been in the neighborhood of ten feet from the edge of the highway.

It thus appears that plaintiff was lying almost in the center of a major highway, which was banked toward him. Apparently he was just past the center of a curve (R. 24). The pavement was slick, and visibility was not too good. There is no evidence whatsoever that in this perilous situation plaintiff took any precautions for his own safety. He did not attempt to keep a lookout and was not aware of the approach of defendants' fifteen-ton truck and trailer (R. 50) until it was virtually upon him (R. 18). In fact, the truck had passed plaintiff, and the back end of the trailer was what hit plaintiff (R. 18, 32). The truck had approached at about 20 to 25 miles per hour (R. 31). Plaintiff had a passenger (R. 14), who was working on the other rear wheel (R. 18). There is no evidence that he was keeping a lookout either, or that plaintiff was relying on him to do so.

Under these circumstances, it is apparent that plaintiff was not exercising the care of an ordinary

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* The Oregon Supreme Court has had frequent occasion to comment on this practice, and on the fact that an appellant must take the consequences of any deficiencies in the record resulting from the failure to put such a diagram in permanent form. See, e.g., Birks v. East Side Transfer Co., 194 Or. 7, 38, 241 P. 2d 120 (1952); Wellman v. Kelley, 197 Or. 553, 570, 252 P. 2d 816 (1953); McAdam v. Royce, 202 Or. 245, 251, 272 P. 2d 986, 274 P. 2d 564 (1954).

reasonable man for his own safety. There is no evidence, in fact, that he exercised any care at all. Even if his vehicle was disabled, so that he had no choice about stopping where he did, he was under an obligation to exercise a degree of care commensurate with the danger of the situation which existed. It can hardly be contended that it was not dangerous to lie prone virtually in the center of a major highway, with what, from the record, was apparently at least moderate traffic. Not only that, but the road conditions were such that plaintiff felt that he would not have had control of his car had he continued to drive. He had arrived at that point without stopping to put on chains, however, and it was reasonable for him to anticipate that some other vehicle might get that far without employing them, and try to drive by on the slippery highway.

It hardly requires citation of authority for the proposition that the degree of care which must be exercised by a person for his own safety is commensurate with the danger to be avoided. This is the rule both in the Oregon and the Federal courts. *Morris v. Fitzwater,* 197 Or. 191, 198, 210 P. 2d 104 (1949); *Burroughs v. Southern Pac. Co.,* 153 Or. 431, 433, 56 P. 2d 1145 (1936); *Carroll v. Grande Ronde Elec. Co.,* 47 Or. 424, 438, 442, 84 P. 389 (1906); *Fred Harvey Corp. v. Mateas,* 170 F. 2d 612, 616, (CCA 9, 1948). Despite the obvious hazards of his position, which plaintiff must have appreciated, there is not a scintilla of evi-

dence of any attempt to guard against the danger, other than a blind reliance on the ability of other motorists to see him, although the visibility was obscured, and avoid him, although the road was slippery and banked toward him. When one thus places himself in a position of danger, without making any effort to protect himself, he is not exercising reasonable care, and it must be held as a matter of law that he is guilty of negligence which contributed to his injury.

An analogous case is *Borgert v. Spurling,* 191 Or. 344, 230 P. 2d 183 (1951). Plaintiff was a passenger traveling in Potterf's car, which ran out of gas. The members of the party pushed it on to the shoulder, as close to the ditch as was practicable, but part of it remained on the highway. Another car, owned by one Fox, offered assistance, and eventually an attempt was made to siphon gas from the Fox car to Potterf's car. For this purpose, the Fox car was parked on the highway alongside Potterf's car, and pointing in the opposite direction. It was night, and the headlights of the Fox car were burning. Plaintiff and another were standing at the rear of plaintiff's car engaged in siphoning gas when defendant ran into them.

The Court, while holding that plaintiff's car was disabled and hence not negligently parked, found that Fox's car was clearly parked in violation of the statute. The Court also held that the evidence

was too indefinite and uncertain to determine whether plaintiff was in any way responsible for the parking of the Fox car. "But the plaintiff knew, or should have known, of the dangerous situation, and he accepted it as a means through which the Potterf car might be gotten on its way again." (191 Or. at p. 352). The Court went on to state:

> "In these circumstances, it might well be urged that the plaintiff was guilty of negligence in undertaking to busy himself about the rear of the Potterf car. Whether this be so or not, it cannot be doubted that reasonable care for his own safety called for the exercise of a high degree of vigilance while he was thus engaged. The fact is, however, that he took no care whatever, as the following excerpt from his cross-examination demonstrates . . ."

The quoted testimony reveals that plaintiff did not keep a lookout in either direction, or ask anybody to do so for him. In that respect, the case is similar to the one before us. In other respects, the cases are analogous. Although we do not here have the dangerous situation created by the lights of the Fox car in the *Borgert* case, we do have the fact that the road was exceedingly slippery, was banked down toward the plaintiff, and that he was lying down almost in the middle of the highway.

In the *Borgert* case, the Court relied on the case of *Tibbetts v. Dunton,* 133 Me. 128, 174 A. 453 (1934) as being analogous and correctly stating the applicable rule of law. In that case, the plaintiff was changing a tire. His car was parked partly on the shoulder and partly in the highway. The Court held that whether he had violated the parking statute was a question for the jury's determination, but that plaintiff was contributorily negligent in failing to keep a lookout and observe the approach of traffic, rather than trusting his safety entirely to the driver of the approaching car. After discussing the parking statute, the Court stated:

> "But apart from this statute, the verdict must be overturned because of contributory negligence of the plaintiff in another respect. Even though he had the right to change this tire there on the highway, would he recover for injuries received while so doing, he must at the time himself have been in the exercise of due care in the performance of his work. The right to stop for a reasonable length of time to do reasonably necessary work on the automobile does not relieve one of the duty of exercising due care for his own safety, while so engaged.
>
> A careful reading of the record, particularly the evidence of the plaintiff himself, convinces us that instead of proving due care while changing this tire, he clearly demonstrated his lack of it. In the observance of due care he was bound, would he not have been contributorily

> negligent, to do for his own safety that which the ordinarily careful and prudent person would have done under the same circumstances. The vigilance of such a person he must have exercised in his own behalf and it should have been 'commensurate with the danger arising from lack of it.' . . . The greater the danger, correspondingly greater is the vigilance required."

This case, which received the express approval of the Oregon Court, is authority for the proposition that plaintiff here was guilty of contributory negligence even if he was legally parked on the highway. There is nothing in the *Tibbetts* case, moreover, to indicate that the danger was as great as it was in this case—plaintiff's car there was only partially on the highway whereas here it was two to four feet from the guardrail, and in the instant case, the road was slippery as well.

The record here demonstrates as conclusively as the record in either the *Borgert* or *Tibbetts* cases the lack of care of the plaintiff for his own safety. Not only is there no evidence to indicate any attempt to give a warning, to keep a lookout, or to ask his passenger to keep a lookout for him, but in addition, plaintiff was so inattentive to his surroundings as to be unaware of the passage of a 31,000 pound truck and trailer, 60 feet long (R. 41), until it was too late to avoid being hit by the rear portion of the trailer (R. 19, 32, 51).

Once again, plaintiff's negligence in the respects indicated being established, "That his negligence contributed to his injury we think there can be no doubt." *Borgert v. Spurling*, 191 Or. at p. 355.

4. Plaintiff Assumed the Risk of the Danger Attendant Upon Putting Chains on His Vehicle at the Time and Place in Question.

The Oregon Supreme Court has recently concluded that the defense of assumption of risk is available in Oregon to an action for negligence. *Hunt v. Portland Baseball Club,* 62 Or. Adv. Sh. 805, 296 P. 2d 495 (1956). Although the limits of the doctrine are not defined in that case, quotations from Prosser on Torts and the Restatement indicate that the conventional doctrine, as applied in other jurisdictions, is also the law of Oregon.

The courts have frequently commented upon the distinction between assumption of risk and contributory negligence, and their similarity to one another. See, e.g., the discussions in *Southern Pacific Co. v. McCready,* 47 F. 2d 673, 674-677 (CCA 9, 1931) and *Weber v. Eaton,* 160 F. 2d 577, 578-579 (CADC, 1947). It seems to be established that both may coexist, although ordinarily, if contributory negligence is present, the presence of assumption of risk as well is irrelevant. In the *Hunt* case, the Oregon Court, by its reference to *Adair v. Valley Flying Service*, 196 Or. 479, 250 P. 2d 104 (1952), as a case

in which the basis of the decision was contributory negligence because of the condition of the pleadings, but which could equally well have been decided on the basis of assumption of risk, adopts this view.

The situation is well outlined by Prosser on Torts (2d Ed.), p. 305, in the following language:

> "In working out the distinction, the courts have arrived at the conclusion that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be. The two may coexist, or either may exist without the other. The difference is frequently one between risks which were in fact known to the plaintiff, or so obvious that he must be taken to have known of them, and risks which he merely might have discovered by the exercise of ordinary care."

The facts already stated establish that the dangers of plaintiff's position were so obvious that he must be taken to have known of them. One cannot lie in the middle of the pavement of a well-traveled highway on which cars are skidding, spinning their wheels, and getting stuck and then claim that he did not appreciate the fact that his course of conduct involved a risk. The fact that the risk was an unreasonable one renders the conduct of the plaintiff negligent, but the fact that he must have known

of and appreciated the dangers, and chose to subject himself to them, is an example of assumption of the risk.

Two early Oregon cases, although decided on the basis of contributory negligence, involve the same principles as here discussed. In *Carroll v. Grande Ronde Elec. Co.*, 47 Or. 423, 84 Pac. 389 (1906), plaintiff's decedent approached too close to a fallen electrical wire and was killed. While holding that contributory negligence precluded a recovery, the Court used language appropriate to the issue of assumption of risk, saying:

> " * * * the rule of law is that one who voluntarily assumes a position of danger, the hazards of which he understands and appreciates, cannot recover from a risk incident to the position."

In *Young v. Prouty Lumber & Box Co.*, 81 Or. 318, 159 P. 565 (1916), the plaintiff was injured by a plank being dropped from a conveyor to the receiving platform on which plaintiff was standing. Plaintiff knew the plank was coming, but failed to get out of the way because he thought he was in a safe place. The Court held that any evidence from which it could be concluded that the men who threw the plank down were negligent was also evidence of plaintiff's negligence, for he knew all that they knew. Having remained in a place of danger, knowing of the risk, plaintiff could not recover.

Any reasonably prudent person in plaintiff's position must have recognized the risk of another vehicle skidding or sliding down the slippery slope of the highway toward him. This was the danger to which he voluntarily exposed himself, and it was precisely the occurrence that led to his injury. He assumed the risk of such an occurrence and is not entitled to recover damages on account of it.

B. There Was No Substantial Evidence that Defendant Was Guilty of Negligence.

Once again, in determining whether the trial judge was correct in holding that there was no substantial evidence of defendants' negligence to submit to a jury, we must look at the total picture confronting the parties. Plaintiff, in his Brief, at pages 5 and 6, paints a horrendous picture of defendant trying to steer his tremendous rig through a narrow gap between parked cars on a "supered" highway which was slick with snow. He concludes that Buck failed to maintain control of his trailer and "gave himself but a margin of five feet in the initial instance."

It is precisely here, however, that the flaw in plaintiff's conception of the case appears. Defendant did not give himself a margin of only five feet—plaintiff left him only that margin! Defendant was required to take the situation as he found it; a dangerous situation indeed, but one created by the

negligence of plaintiff. Even had the situation not been the result of plaintiff's negligence, but solely of the weather conditions, it was certainly not the fault of the defendants.

Plaintiff and his car were occupying up to about ten feet of the pavement on defendant's side of the road when defendant came along; that is why it was necessary for defendant to drive up on the upper side of the highway. Although plaintiff estimated that there was 30 to 40 feet of space between his car and the car parked across the highway, he admitted that the other car was off the highway, and that the highway was only 26 feet wide (R. 23). That is why it was necessary for defendant to pass within five or six feet of plaintiff.

Although plaintiff charged the defendant with traveling at an excessive speed under the circumstances (R. 5), there is no evidence to support such a charge. The highest estimate of defendant's speed, made by plaintiff's witness Moore was "20 miles an hour; maybe 25." All the witnesses agreed that the trailer slid down the slope of the highway toward the plaintiff (R. 19, 32, 50). This could only have happened because the speed was too slow to maintain the forward momentum, rather than the contrary (R. 46). Plaintiff seems to have adopted this view on appeal (R. 6). But, under the circumstances, it would have been negligence to have

traveled any faster, in view of the dangerous condition created by plaintiff's presence on the highway. Defendant had to maneuver his truck and trailer through the gap, and he necessarily slowed down to do so (R. 43). The control he had over his vehicle is illustrated by plaintiff's own testimony that the truck was brought to a stop, on that slippery highway, within "10 or 12 feet" (R. 19).

Moreover, defendant had to keep going, because if he had stopped, he would have slid down the highway into the cars parked behind plaintiff's (R. 47). He had been planning to stop, but he was waved through by Moore (R. 47), who originally denied having done so (R. 34), but after examining his statement admitted that he had (R. 39).

There is absolutely nothing in the record to evidence any act of negligence on the part of Buck which caused the trailer to slide down the grade into plaintiff. He was forced to accept the situation as he found it, a situation not of his own making but of plaintiff's. Like plaintiff, he had not anticipated the slipperiness of the highway (R. 43) until he got to the point where plaintiff had stopped, and by then it was too late to do anything but try to go through the remainder of the highway left for his use. His skidding was caused, not by a sudden application of the brake, or by acceleration, but by the slowing down necessitated by the situation.

Defendants have no quarrel with the rules of law stated in any of the cases cited by plaintiff, but it is apparent that none of them are even slightly analogous to this situation. Thus, in the case of *Deyo v. Detroit Creamery Co.*, 257 Mich. 77, 241 N.W. 244, there was evidence that the defendant's truck made a sudden and unnecessary turn, which caused the trailer to skid and injure the plaintiff. Moreover, defendant was not faced with a difficult situation created by the plaintiff's negligence. In this case, there is no evidence that defendant did anything to cause the trailer to slide other than slow down, and that was made necessary by the narrow area of the highway left for him to travel on.

In *W. & W. Pickle & Canning Co. v. Baskin,* 236 Ala. 168, 181 So. 765, the plaintiff's intestate was lawfully using the highway, two feet off the pavement. Defendant's trailer had to go off the highway to strike him, which was caused by turning too far to the right in the first instance and swerving to get back on the road. Again, the distinction is obvious. Plaintiff herein was occupying half of the highway, and it was his negligence, rather than defendant's, which created the dangerous situation.

In *Cook v. Miller Transport Co., Inc.,* 319 Pa. 85, 179 A. 429, the street was 34 feet wide, but the truck passed within five feet of the boy who was standing five feet from the curb. It is obvious that the truck

was driving in the center of the highway instead of on its own side. When another vehicle approached, the truck had to swerve to the right, and its trailer skidded to the left, injuring the boy. If the truck-driver had not been negligent in driving partially on the wrong side in the first instance, the accident could not have happened. The position of the boy did not in any way restrict his use of the road.

In *White v. Kretz Bros.*, 122 Cal. App. 197, 10 P. 2d 198, defendant was driving with his left wheels only three feet from the left side of the highway, almost completely in the wrong lane. Plaintiff was virtually off the highway, coming in the opposite direction. When the truck driver attempted to swerve back on to his own side, the trailer swung over and hit plaintiff's car.

In *Commercial Carriers v. Small,* 277 Ky. 189, 126 SW 2d 143, the defendant's truck approached a narrow bridge at an excessive speed, swaying back and forth. It was on the wrong side of the road. Plaintiff was almost stopped, just before coming to the bridge. He was on his own side of the road, going in the opposite direction. The truck driver swerved back to his own side, and the trailer swung out to the left, hitting plaintiff's car.

In *Thomas v. Shippers Express & Warehouse Co.,* 158 So. 859 (La. App.) the plaintiff was where he

had a right to be, off the highway. Defendant's truck driver negligently engaged in some horseplay with friends along the side of the road, and then looked back and waved to him, and his truck ran off the right. He swerved, and his trailer moved sideways into plaintiff.

All of the foregoing cases have in common the fact that the driver of the truck made a sudden swerve which was either unnecessary or necessitated by the defendant's own prior negligence. In all of them the plaintiff was making a lawful use of the highway. In none of them was the defendant faced with a dangerous situation, other than one of his own making. Put simply, in all of them some act of negligence was shown which caused the trailer to skid or swerve into the plaintiff.

The quotations from Blashfield are not very meaningful in the absence of a discussion of the cases which support them. In a work of that kind, which does not purport to be a scholarly analysis of the law, but merely a description of the cases, it is easy to find general language to support any side of the controversy. To illustrate, some of the other statements made in the same section quoted by plaintiff (Sec. 749, Vol. 1, Part 2) are:

> "The skidding of an automobile may be made the basis of a finding of negligence only if it was due to some negligent conduct on the part of the motorist."

"If the accident resulted from the condition of the road and not from any negligence of the driver, no liability exists."

"In determining whether the skidding of a motor vehicle was caused by some negligent act or omission on the part of the driver, or in determining liability for an accident, the condition of the pavement or highway, and the question whether the driver took that condition into account, the speed of the vehicle, the use of the brakes, and the nature and course of the skidding are matters which can be taken into consideration.

"The tendency to skid on a wet or icy pavement is increased very materially by accelerating suddenly, or suddenly applying the brakes."

The latter paragraph incidentally, is from the same authority quoted by Blashfield for the statement plaintiff cites, that "Nineteen out of twenty skids could have been avoided." No doubt most of the nineteen are those in which a sudden braking or acceleration took place. There is no evidence that it did so here.

The first two paragraphs are substantiated by the weight of authority, including cases from the jurisdictions from which plaintiff cites decisions. Thus, in *Richardson v. Patterson,* 368 Pa. 495, 84 A. 2d 342 (1951), defendant was driving on a straight, level highway at twenty miles per hour. It was a cold, gusty day, with snow flurries, and there were

patches of ice on the road. She suddenly skidded across the highway onto plaintiff's side. The Supreme Court of Pennsylvania, in a 5-1 decision, affirmed a judgment of nonsuit, saying:

> "The skidding of a vehicle does not of itself establish or constitute negligence. It is incumbent upon the plaintiff to prove the skidding resulted from the negligent act of the defendant; otherwise he is absolved from the consequences."

The defendant there was not trying to maneuver a heavy truck and trailer through a narrow gap on a supered highway, but was driving on a straight level road. If skidding under those circumstances is not enough to establish negligence, how can it be negligence in this case?

In *Atlantic Greyhound Corp. v. Franklin,* 301 Ky. 867, 192 S.W. 2d 753 (1946), a Greyhound bus skidded into another bus while turning a corner on an icy street. The Court held that in the absence of evidence of negligence, a verdict for plaintiff must be reversed, with instructions to enter judgment for defendant.

In *Sherwood v. Radovsky,* 317 Mass. 307, 57 N.E. 2d 912 (1944), plaintiff's car had just had a collision with another car, and she was standing between them. Defendant skidded on the very slippery and icy roadbed, and struck one of the cars, jamming

plaintiff between them. The Court reversed a judgment for plaintiff with directions, saying:

> "It has been held repeatedly by this court that 'the mere skidding of a motor vehicle, unexplained, is not evidence of negligence.' * * * In the case at bar the evidence disclosed nothing bearing on the question of negligence beyond the fact that the defendant's automobile on an icy day skidded into the plaintiff's automobile and pushed it about three feet. It is true that skidding may occur in connection with other acts or omissions of the operator of an automobile in such circumstances as to warrant a finding of negligence * * * But on the evidence here the cause of the skidding remains unexplained by any negligent act or omission on the part of the defendant * * *." (Citations omitted).

In *Walls v. Consolidated Gas Utilities Corp.*, 150 Kan. 919, 96 P. 2d 656 (1939), a gas truck traveling 17 miles per hour on an icy, slippery, street, hit an eight year old boy. The Court held that there was no evidence of negligence, pointing out that the speed of the truck's stop was indicative of good brakes. A judgment for plaintiff was reversed with directions.

In *Weiner v. J. I. Hass, Inc.*, 251 App. Div. 412, 296 N.Y.S. 703 (1937); aff'd, 276 N.Y. 661, 13 N.E. 2d 51 (1938), plaintiff's decedent's truck was standing in the highway, unable to move because of ice on the road. Decedent was lying on the pavement with his legs sticking out. Defendant was driving downhill

slowly, tried to stop, and skidded into the truck. The Court held that there was no evidence of negligence.

In *Bradley v. Thomas M. Madden Co.*, 333 Ill. App. 153, 76 N.E. 2d 797 (1948), only the abstract was published. It indicates that defendant skidded to the wrong side of the street on any icy pavement. He was traveling 20 miles per hour. He was held not guilty of negligence, in the absence of any showing of negligent acts. Plaintiff's judgment was reversed with directions.

In the instant case, there is not a scintilla of evidence of negligence. That defendant was traveling at a reasonable speed can hardly be controverted, in view of the fact that he brought a 15-ton rig to a stop on a slippery supered highway within ten or twelve feet. In fact, had he been going faster, the trailer would not have slid downhill. But it can hardly be said that under the circumstances he was negligent in not going faster.

Plaintiff's position seems to be that he had created a situation so dangerous, by parking in the highway to put chains on, that it was negligent for anyone else to try to use the highway at all, at any speed. We do not believe that this position will commend itself to the Court. Defendant was proceeding with due care, and attempting to negotiate the highway in the situation he faced, which was not his responsibility. Under the circumstances, there

was nothing else he could have done. The trial court was correct in ruling that there was no evidence of negligence.

CONCLUSION

Plaintiff has not chosen to argue in his opening brief the ground for dismissal asserted by defendants at trial, and hence we do not know what explanation he offers for his conduct, or how he proposes to show that it was consistent with ordinary prudence. We will have no attempt to rebut whatever argument he may make in reply. But the facts of the case make the conclusion of contributory negligence and assumption of risk so manifest that they constitute a rebuttal in themselves.

The argument of plaintiff, in fact, is self-defeating. The more he attempts to show that the situation was so dangerous that defendant was negligent in trying to drive past, the more he demonstrates his own foolhardiness in lying on the highway under the circumstances, without taking even the slightest precaution for his own safety.

Defendant had to take the circumstances as he found them. He was necessarily required to drive up on the upper side of the supered highway, within a few feet of plaintiff, because that was all that was left of the highway for him to travel on. Plaintiff and his car were blocking the rest. He traveled

at a reasonable speed, and under good control, and was almost successful in avoiding an accident despite the danger inherent in the situation. There is no evidence of any negligence on the part of the defendants which caused the trailer to slide down into plaintiff.

Wherefore, defendant respectfully submits that the judgment of the court below is free from error, and should be affirmed.

Respectfully submitted,

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